United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

77-7088

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 77-7088

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P/S

RICHARD J. STULL,

Plaintiff-Appellant,

-against-

NICHOLAS H. BAYARD, PAUL L. MILLER, HOWARD PIPER, THOMAS F. PIPER and WILLIAM T. PIPER, JR., INDIVIDUALLY AND AS EXECUTORS OF THE ESTATE OF WILLIAM T. PIPER, DECEASED, NICHOLAS H. SALGO, DAVID W. WALLACE, BANGOR PUNTA CORPORATION and THE FIRST BOSTON CORPORATION,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

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APPELLANT'S BRIEF

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UNITED STATES COURT OF APPEALS
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RICHARD J. STULL,

Plaintiff-Appellant,

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NICHOLAS W. BAYARD, PAUL L. MILLER, HOWARD PIPER, THOMAS F. PIPER AND WILLIAM T. PIPER, JR., INDIVIDUALLY AND AS EXECUTORS OF THE ESTATE OF WILLIAM T. PIPER, DECEASED, NICHOLAS H. SALGO, DAVID W. WALLACE, BANGOR PUNTA CORPORATION and THE FIRST BOSTON CORPORATION,

Defendants-Appellees.

APPELLANT'S BRIEF

Appellant, having brought a class action to recover damages on behalf of shareholders of Piper Aircraft Corporation ("P.C.") for respondents' misconduct in connection with tender offers for P.C. stock in violation of Section 14(e) of the Securities Exchange Act of 1934, as amended ("1934 Act" hereinafter and sometimes also referred to as the Williams Act), appeals from an order of the

District Court for the Southern District of New York (Wyatt, J.) dismissing the action upon the grounds that the applicable statute of limitations had expired prior to its commencement and denying as moot appellant's motion for class determination and partial summary judgment. The decision below (A68) is reported at 424 F.Supp. 937.

Questions Presented

1. Was this action barred by the New York Statute of Limitations CPLR Sections 203(f) and 213(8)?

2. Was the New York Statute of Limitations CPLR Sections 203(f) and 213(8) tolled by the commencement of an earlier class action in May 1972, entitled Lillian Stull v. Pool, 72 Civ. 2055?

Jurisdiction

The order and judgment below were entered on January 19, 1977 (A7). The notice of appeal was filed on February 16, 1977 (A8, 87). This Court's jurisdiction rests upon 28 U.S.C. § 1291.

The District Court's jurisdiction rests upon Section 27 of the 1934 Act.

Statement of the Case

Introduction

This action had its genesis in the Chris-Craft-Bangor Punta ("Bangor") takeover attempts to capture control of P.C. The ensuing litigation between Chris-Craft and Bangor, as well as the SEC, spawned by these attempts are reported in 303 F. Supp. 191, aff'd. 426 F.2d 569; 331 F. Supp. 1154; 337 F.Supp. 1128; 480 F.2d 341; 384 F.Supp. 507; 516 F.2d 172; U.S. , 97 S. Ct. 926 (Opinion of United States Supreme Court, February 23, 1977).

The Supreme Court ultimately decided that Chris-Craft lacked standing to seek relief under Section 14(e). It concluded that the sole parties who had standing to invoke that Section were the shareholders of the target company - such as appellant at bar.

The Facts Giving Rise to the Case at Bar

There can be no dispute as to the underlying facts of this litigation. These facts can be deemed admitted for the purposes of this appeal, respondents never contesting them in their cross motions for summary judgment. The facts are established, moreover, either by the doctrine

of collateral estoppel or res judicata.* The facts set forth hereinbelow are those found by the District Court, this Court and recited by the Supreme Court in its opinion of February 23, 1977.

After concluding a number of cash purchases of P.C. stock in the open market, and following unsuccessful preliminary overtures to P.C., Chris-Craft publicly announced a cash tender offer on January 23, 1969 for up to 300,000 Piper shares at $65 per share - approximately $12 above the then current market price. P.C., after meeting with respondent First Boston and other advisors, determined on January 24, 1969 to oppose Chris-Craft's tender offer. P.C.'s management sent several written communications to its shareholders urging non-acceptance of the Chris-Craft offer. Indeed, on January 27, respondent W.T. Piper, Jr., P.C.'s President, stated that the P.C. Board "has carefully studied this offer and is convinced that it is

* The Supreme Court in reversing this Court did not disturb any of the findings of fact. Even if the reversal be deemed to have disturbed such fact findings, the conclusions would be the same if appellant was to be put to the task of proof. He would simply call the same witnesses, use the same exhibits and depositions as did Chris-Craft and the conclusions would necessarily have to be the same.

inadequate and not in the best interests of P.C.'s shareholders...."

These written communications were found to be fraudulent by reason of the failure to disclose, among other things, that P.C.'s various advisors, including First Boston, had determined the Chris-Craft offer to be fair and adequate and that the Piper family and management were wrongfully engaged in negotiations with Grumman Aircraft Corporation ("Grumman") for the purchase by Grumman of Piper shares.

On January 29, 1969, P.C. and Grumman entered into an agreement whereby Grumman agreed to purchase 300,000 authorized and unissued P.C. shares at $65 per share. P.C. issued a press release and a written communication to shareholders announcing the Grumman transaction. This was found to be fraudulent by reason of the failure to disclose that Grumman had an option to sell the shares back to P.C. at cost plus interest and that P.C. was required to maintain the funds received from such sale separately and free from liens.

Chris-Craft succeeded in acquiring 304,606 shares by February 3, 1969. To obtain the additional percentage of P.C. stock needed for control, Chris-Craft determined to make an exchange offer of its securities for

P.C. stock. It filed a preliminary prospectus and registration statement with the Commission in February 1969. That exchange offer became effective on May 15, 1969.

The Grumman agreement was terminated in March 1969, and, while Chris-Craft's exchange offer was in registration, the Pipers ultimately entered into negotiations with Bangor. Bangor had initially been contacted by respondent First Boston in January 1969 as a consequence of the Chris-Craft initial tender offer. The Piper family agreed on May 8, 1969 to exchange their 31% stock holdings in P.C. for Bangor Securities and Bangor also agreed to use its best efforts to achieve control of P.C. by means of an exchange offer of Bangor securities for P.C. common stock. A press release was issued on May 8, 1969 announcing the terms of the agreement and included a provision that the forthcoming exchange offer would involve Bangor's securities to be valued in the judgment of First Boston "at not less than $80 per Piper share." This release, along with certain private purchases, made by Bangor in May 1969 was held to constitute "gun-jumping" and in violation of the Commission's rules.

Bangor's exchange offer was filed and became effective on July 18, 1969.

Chris-Craft's first exchange offer failed to produce the specified minimum number of tenders of Piper shares. Accordingly, it modified the terms of that exchange offer by adding the payment of $10 in cash to make it more attractive and to compete with Bangor's exchange offer. Chris-Craft's modified exchange offer expired on August 4, 1969.

Bangor's exchange offer effective on July 18, 1969 included financial statements reviewed by First Boston which represented that one of its subsidiaries, Bangor and Aroostock Railroad, had a value of 18.4 million dollars. This valuation was found to be misleading and fraudulent since it failed to disclose that Bangor was considering its sale and that an offer for such sale had been made in the amount of 5 million dollars.

On August 4, 1969, when Chris-Craft "left the tender offer field," Bangor owned a total of 44.5% while Chris-Craft owned 40.6% of Piper's stock. The balance of P.C.'s stock - 14.9% - remained in the hands of the public (including appellant).

The Procedural Steps Giving Rise to the Issues Herein

Appellant's firm, lawyers of the plaintiff stockholder bar, represented appellant's wife, Lillian Stull, in commencing two

litigations involving the Chris-Craft Bangor tender offers. In 1969, Mrs. Stull commenced a stockholder's derivative action on behalf of P.C. attacking the Chris-Craft tender offer of $65 per share, claiming that that amount was less than the fair value and constituted a raid on P.C. Stull v. Green, 69 Civ. 440 (A69).

In 1972, approximately two and one-half years after the cause of action had accrued, she commenced a class action on behalf of the present P.C. shareholders claiming that the class was deprived of Chris-Craft's tender and exchange offers by virtue of the false and misleading communications made to said shareholders. Stull v. Pool, 72 Civ. 2055 (A 43,70).

Appellant was a member of the putative class described in the second Stull action.

The District Court denied class status to Stull v. Pool in an Opinion dated April 30, 1974 (63 F.R.D. 702). The Court assumed that the action "is an appropriate one for class treatment..." but concluded that Mrs. Stull would be an inadequate representative because, inter alia, of her husband's representation in the action.

Immediately thereafter, appellant's firm withdrew as counsel and the firm of Milberg & Weiss was substituted as attorneys. The new firm appealed to this Court from the class denial and renewed the motion for class determination before Judge Owen. He denied that renewal of the motion without prejudice until the appeal could be disposed. Thereafter, the appeal was dismissed.

Both of the Lillian Stull actions were consolidated and transferred to Judge Wyatt. The parties under the direction of Milberg and Weiss commenced settlement discussions.

Respondents sought to include appellant in those discussions in order to obtain his release in their favor. He refused to participate, expressly informing them and the magistrate to whom the case had been assigned, that he would not release his claims and that he planned to institute action on behalf of the class.* (A65-66)

*The District Court found inconsistencies in appellant's deposition taken on December 16, 1975(A73). At that time, Mrs. Stull and her attorneys, Milberg & Weiss were conducting settlement discussions. A fair reading of the testimony would, however, disclose that there were no inconsistencies. Thus, appellant testified:

"Q. Were you informed of the substance of those discussions?

A. No. What do you mean by substance, that there were discussions taking place? Yes. But what the settlement is, I am absolutely uninterested, I have nothing to do with it. I am completely divorced from Stull against Green and Stull against Poole. Those are Lillian Stull's cases. (Emphasis supplied)

Q. Do you know whether Lillian Stull was ever informed of a proposed settlement of Stull against Poole?

A. I have asked Lillian Stull to exclude me from any discussion. I am completely divorced and devoid of any knowledge of, by instructions of my counsel, by my own native sense of propriety and I have nothing whatsoever to do with the -- I don't know what the status of her case is, and I'm keeping myself out. I have completely kept myself out." (SM 86)

Appellant commenced this action on August 1, 1975 (A1, 66). He alleged that as a result of the illegal activities of respondents, he and the class were deprived of a Chris-Craft tender offer (A9).

A stipulation of settlement of the first action brought by Mrs. Stull (the derivative suit) was filed and an order of the Court was entered on February 11, 1976 directing notice to be sent and a hearing to be held on March 26, 1976 (A75).* This stipulation and order of settlement was filed approximately six and one-half months after the action at bar had been commenced and actively litigated. The District Court approved the settlement on March 26, 1976 (A75). At the same time, Mrs. Stull settled her second action - the action that had been denied class status.

In this action, appellant moved for class determination and for partial summary judgment on or about September 12, 1975 (A1). The motion was denied without prejudice to renewal after the parties had completed discovery (A2). Appellant renewed the motion on or about August 24, 1976 (A5, 25). Respondents secured several adjournments of the motion and, on or about November 30, 1976, respondents cross-moved for summary judgment dismissing the complaint (A6, 38, 39, 46, 63). The District Court refused to permit appellant any extensions or adjournments but allowed him approximately three days to respond.

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* A reading of the Court files discloses that the "settlement" encompassed, inter alia, P.C. litigating the claims in a separate action in Pennsylvania, thereby removing the need for the derivative case.

The Court limited the issue to be decided to the question of the statute of limitations. Thereafter, it summarily dismissed the action upon the grounds that the statute of limitations had expired prior to the commencement of the suit, and denied appellant's motions as moot. (A68, 86)

We shall show below, that the District Court erred for two separate and independent reasons.

POINT I

THE NEW YORK STATUTE OF LIMITATIONS HAD NOT EXPIRED PRIOR TO THE COMMENCEMENT OF THE ACTION

The District Court determined that the applicable statute of limitations as New York CPLR Sections 213(8) and 203(f) which, read together, provided for a six year limitations period. It concluded that the limitations period commenced to run on July 18, 1969 (the date of Bangor's exchange offer) and expired six years thereafter or prior to the commencement of this action.

The claim at bar based upon violations of Section 14(e) is solely a federal claim. Under such circumstances, it is well settled that where fraud is involved - as in the case at bar - with the facts surrounding said fraud being concealed, the statute does not commence to run until discovery of the facts or when they reasonably

could have been discovered. Holmberg v. Armbrecht, 327 U.S. 392, 66 Sup. Ct. 582 (1946); Bailey v. Glover, 21 Wall 342 (1875); Moviecolor Ltd. v. Eastman Kodak Co., 288 F. 2d 80 (2d Cir. 1961) cert. den. 368 U.S. 821; Janigan v. Taylor, 344 F. 2d 781 (1st Cir. 1975); Newburger, Loeb & Co., Inc. v. Gross, 365 F.Supp. 1364, 1371-3 (S.D.N.Y.1973); Pollard v. U.S.A., 384 F.Supp. 304 (N.D. Ala. 1974).

At bar, respondents did not claim that appellant acquired knowledge of the fraud prior to August 1, 1969. They argued below that appellant acquired knowledge of the fraud on May 13, 1970 - the date he filed an amended complaint in the first of the Lillian Stull actions - the derivative suit (A42). Appellant conceded at his deposition that he acquired such knowledge on or about December 10, 1971, as a result of Judge Pollack's decision in the Chris-Craft litigation (337 F.Supp. 1128).

Since six years from the earliest date, i.e. May 1970, would not have expired until May 1976, appellant commenced his suit on August 1, 1975 and, hence, was timely. The District Court failed to consider the federal tolling doctrine applicable to the commencement of a statute of limitations and, hence, must be reversed.

There is yet another separate and independent reason why the District Court was in error. The District Court ruled that appellant's cause of action under Section 14(e) accrued on July 18, 1969 and thus his suit was time barred. We submit that the cause of action did not accrue until August 4, 1969. Hence, his suit was timely.

Under Federal as well as New York State law, the statute of limitations commences to run when the cause of action accrues (and this is expressly provided for in the fraud statute of limitations CPLR § 203(f)).

Sack v. Low, 478 F.2d 360, 365 (2d Cir. 1973);

Hoff Research & Dev. Lab., Inc. v. Philippine Nat. Bank, 426 F.2d 1023, 1026-7 (2d Cir. 1970);

Rutkin v. Reinfeld, 229 F.2d 248, 252 (2d Cir. 1956) cert. den. 352 U.S. 844;

Barninger v. National Maritime Union, 372 F.Supp. 908, 913 (S.D.N.Y. 1974);

Hoover v. Allen, 241 F.Supp. 213, 226 (S.D.N.Y. 1965);

Lowell Wiper Supply Co. v. Helen Shop, Inc., 235 F.Supp. 640, 644 (S.D.N.Y. 1964);

Cary v. Koener, 200 N.Y. 253 (1910);

Hibernia National Bank v. Locombe, 84 N.Y. 367 (1881);

Allen v. Payson, 170 Misc. 759, 11 N.Y.S.2d 28, 32 (S.Ct. Queens Co. 1939)

Under these authorities, for purposes of determining when a cause of action accrues thus commencing the running of the statute of limitations, a party can only sue when his right to do so becomes vested and the party is first enabled to maintain the particular action in question. See e.g. Cary v. Koener, supra.

And under traditional law, a party can only maintain his action when he has suffered an injury or loss. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338 (1971), Sack v. Low, supra, at P. 365.

In Barninger v. National Maritime Union, supra, plaintiff commenced an action alleging that the defendant union was guilty of unfair repreentation by amending a pension plan to discriminate against the plaintiffs. The amendment had occurred more than six years before the commencement of the action. However, the action was commenced within six years after plaintiff had become vested with rights under the pension plan had there been no unfair discrimination. The Southern District held the suit to be timely commenced. It determined that the cause of action accrued when the plaintiff became entitled to vindicate his individual rights.

In Allen v. Payson, supra, defendant's testatrix had agreed with plaintiff's uncle to make mutual wills to provide for dispositions to certain relatives. Such mutual wills were originally executed, but upon the death of plaintiff's uncle, defendant's testatrix changed the will to permit the disposition of the estate to other relatives. Upon her death, an action was brought for specific performance. The applicable statute of limitations had expired if the cause of action accrued from the date of the will change by the testatrix and, therefore, defendant asserted that the suit was time barred.

The Court held that the statute had commenced to run from the death of the testatrix. Up to that point, the Court held she was still free to change her will again to adhere to the agreement.

The same reasoning applies to the case at bar. Here, the claim is deprivation of valuable tender offers, i.e., the Chris-Craft sweetened exchange offer. Appellant was free to accept that offer until August 4, 1969, when that offer expired. The commencement of the statute of limitations assumes that the starting date is the first day a plaintiff could sue. If appellant sued prior to August 4, 1969, that suit would have been dismissed as premature because appellant would have still been free up to August 4, 1969 to accept the offer. Indeed, respondents were free up to August 4, 1969, to make complete and truthful disclosure, thereby enabling appellant and the members of the putative class to accept the Chris-Craft offer. It was not until August 4, 1969 that the cutoff occurred and nothing respondents could do thereafter would enable appellant to accept the Chris-Craft offer that had already expired.

The District Court determined that the statute of limitations had commenced to run from the last act committed by respondents, i.e. Bangor's exchange offer of July 18, 1969.

We submit this was in error. The short answer was set forth in Barninger v. National Maritime Union, supra at Page 913:

> "But the issue of when the statute began to run may turn not on the time when the defendant set in motion the chain of events that led to ultimate injury but rather when the plaintiff first had a claim for relief. The test is when the particular plaintiff became entitled to vindicate his individual rights. See, e.g., Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 339-340, 91 S.Ct. 795, 28 L. Ed. 2d 77 (1971)."

The District Court attacked appellant's motive in commencing this action, stating that his deposition testimony with respect to his knowledge of the settlement was "evasive and hard to believe" and that he set out to commence the action in order to enable him and his wife to enjoy the benefits of the settlements of her actions while preserving the possibility of future benefits through prosecution of this action (A73,74).

These comments are gratuitous, unfair, inappropriate and irrelevant to the issues under consideration.

The comments of the District Court had nothing whatever to do with its determination of the statute of limitations issues. Motives of a plaintiff bringing a class action are irrelevant. Cf. Dorfman v. First Boston Corp., 62 F.R.D. 466 (E.D. Pa. 1973); Chevalier v. Baird Savings Association, 72 F.R.D. 140,

147 (E.D. Pa. 1976); Denny v. Carey, FRD (E.D. Pa. Opinion Feb. 18, 1977).

But even if the District Court's comments respecting appellant's motion were pertinent to the statute of limitations discussion, they are not supported by the record. The pretrial deposition testimony of appellant fairly summarized was: That he knew of the fact of settlement negotiations but refused to participate therein and did not know its details. Appellant's opposing affidavit makes this quite clear, and respondents did not attempt to refute his statements.

If appellant's credibility was to be an issue, summary judgment was not the method by which it was to have been determined. The District Court should have directed a hearing, during which appellant would have been given an opportunity by oral testimony to demonstrate that he was credible.* "Trial by affidavit" is not the proper

* It was inappropriate for the District Court to speculate on the fact that appellant had somehow controlled his wife. The marital relationship between appellant and his wife was not something to be guessed at by the District Court. Appellant should not have been put to the task of having to secure a divorce because he disagreed with his wife in order to satisfy the District Court as to his good faith. Indeed, had a hearing been held, appellant would have been able to show that Mrs. Stull had her own income, employment in a local college for many years and is a person who is not controlled by him. Cf. Fischer v. I.T.T., 72 FRD 170 (E.D.N.Y.1976).

means of determining credibility. See Korn v. Franchard, 443 F.2d 1301 (2d Cir. 1971); Colby v. Klune, 178 F.2d 872 (2d Cir. 1949); Rickel v. Levy, 370 F.Supp. 751, 754 (E.D.N.Y.1974).

Indeed, insofar as these issues are concerned, when they involve the application of the statute of limitations, this Court has already held that they must be determined at a trial. Klein v. Auchincloss, Parker & Redpath, 436 F.2d 339, 341 (2d Cir. 1971).

Finally, it was equally unfair for the District Court to claim that appellant brought this action seeking to preserve "the chance of future benefits" while presently enjoying benefits of the settlement of his wife's actions. Appellant made it clear without contradiction by respondents that he sought no profit from the bringing of the class action. He negated expressly, any sharing of fees and undertook to pay the expenses of the litigation. His only "future benefit" would be whatever share his membership in the class would bring. This is a far cry from suggesting that he would profit from this action while enjoying the benefits of his wife's "private" settlement.

The District Court also criticized appellant's failure to object to the derivative settlement or to intervene in his wife's private action. While we shall deal with the latter in Point II, infra, it is sufficient to say that either consideration was irrelevant to the commencement of the instant suit.

To object to the derivative settlement, appellant would have to claim that P.C. had not received enough. Since appellant took the position that it was respondents' activities which prevented his accepting a valid tender offer, he had a right of direct recovery from those responsible for their Williams Act violation and this right of recovery existed independently of any wrong committed upon P.C. Cf. General Rubber v. Benedict, 215 N.Y. 18 (1915). An appellant's right of recovery for the direct injury to him should not depend upon his objecting to the inadequacy of a derivative settlement.

By like token, compelling appellant to intervene in a private suit with a putative class action would also serve no purpose.

POINT II

THE RUNNING OF THE STATUTE OF LIMITATIONS IN THIS CASE WAS SUSPENDED UNDER THE DOCTRINE OF AMERICAN PIPE & CONSTRUCTION CO. V. UTAH

Mrs. Stull's second action commenced in 1972 - approximately two and one-half years after the wrongs had accrued - sought redress for the class of P.C. stockholders who had not tendered their shares. Appellant was a member of that putative class. That action, as noted before, was denied class action status in 1974 at the earliest (without effect to the reargument application and notice of appeal therein). Thus, appellant should have received approximately two years tolling of the New York Statute of Limitations.

In American Pipe v. Utah, 414 U.S. 538, 554, 94 S.Ct., 756, 766 (1974), the Supreme Court held:

> "We are convinced that the rule most consistent with federal class action procedure must be that the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action."

Accord, Escott v. Barchris, 340 F.2d 731 (2d Cir.1965) cert. den. 382 U.S. 810.

In American Pipe, the Supreme Court dealt with the problem of parties seeking intervention in an action originally commenced as a class suit, in which class action status was denied by reason of the failure to demonstrate numerosity, and which denial and attempted intervention had occurred after the statute of limitations for the claims of the intervenors, former members of the purported class, had expired. The Supreme Court permitted intervention holding that the filing of a class action complaint tolled the statute of limitations for all of the purported class members until that class was denied.

The District Court concluded that its reading of American Pipe compelled the view that the tolling benefits were available only to those who sought intervention, and, since appellant did not seek intervention, he could not obtain the benefits of tolling.

We submit that American Pipe does not compel so limited a conclusion.

In Eisen v. Carlisle & Jacquelin (Eisen IV), 417 U.S. 156, 176, 94 S. Ct. 2140, 2152 (1974), Mr. Justice Powell, writing for the Court, implied that

American Pipe would not be limited solely to an intervention situation. There, in dealing with notice to a nationwide class, and in responding to the claim that members would not opt out of the nationwide class because the statute of limitations had expired on their individual claims, he stated in Footnote 13:

> "Petitioner also argues that class members will not opt out because the statute of limitations has long since run out on the claims of all class members other than petitioner. This contention is disposed of by our recent decision in American Pipe & Construction Co. v. Utah, 414 U.S. 238, 94 S.Ct. 756, 38 L.Ed. 2d 713 (1974), which established that commencement of a class action tolls the applicable statute of limitations as to all members of the class." * (Emphasis supplied)

In the concurring opinion, Mr. Justice Douglas supported this broader reading of American Pipe, see Pages 181 and 182 of 417 U.S.

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* The District Court could not reconcile this Footnote, calling it "a puzzling Footnote" which "...might suggest a broader reading of the effect of American Pipe...." (A82, 424 F.Supp. at Page 943).

Indeed, in the period following the Supreme Court decision in American Pipe, other courts have not limited the American Pipe to intervention alone. See In Re: Master Key Antitrust Litigation, 70 FRD 29 (D.Conn. 1976); Agostine v. Sidcon Corporation, 69 FRD 437, 448, note 13 (E.D. Pa. 1975). Cf. Katz v. Carte Blanche Corporation, 496 F.2d 747, 761 (3rd Cir. 1974).

Thus, in Agostine v. Sidcon Corp., supra, a federal district court granted class action certification to a class suing under the Truth in Lending Act. In Agostine, the Court stated that if the problem arose whereby it was demonstrated that each class member could recover more by suing individually than by being a member of the class, these dissatisfied class members could opt out after certification, commence individual actions, and still obtain the benefits of a tolling of the running of the statute of limitations.

Logic and common sense dictate that American Pipe must have a broader reading to permit separate suits rather than intervention in order to ensure uniform treatment.

For example, when a court certifies a class and members thereof opt out, and the certification has taken place after the statute of limitations has expired, if American Pipe is to be read as having benefits only for those who intervened in a suit which has been denied class status, those who opt out will have their claims time barred. This was not the intent as evidenced by Mr. Justice Powell's comment in Eisen IV.

Similarly, if a Court certifies a class which is smaller in dimension than that alleged by the plaintiff, what is to happen to the "excluded class members" if the limitations period has expired?

Under American Pipe, therefore, a party must be free to bring a separate litigation. See In Re Master Key Antitrust Litigation, supra. Hellerstein v. Mather, 360 F. Supp. 473, 474-5 (D. Colo. 1973) (Decided before the Supreme Court decision in American Pipe but which relied upon the 9th Circuit decision in American Pipe, 473 F.2d 590, which was affirmed in that opinion).

Similarly, to permit American Pipe benefits to be extended only to intervention would mean, once class status is denied, intervention applications from hundreds and hundreds of putative class members all seeking to

join the individual suit. The attendant difficulty of a litigation having hundreds of parties plaintiffs - presumably each with separate counsel - would make management problems so difficult as to insure that the case could not progress.*

It may also be noted that intervention is permissive, requiring the Court's approval. If the Court should choose not to approve, then the intervenor would be "time barred" without an opportunity to redress his wrong.

At bar, appellant wished to commence a class action. Under these circumstances, to envision intervention in an individual suit for a putative class action is to carry imagination too far. The two litigations are basically inconsistent and difficult to manage. Under such circumstances, appellant must be free to obtain

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* At bar, there is even further difficulty in that neither Judge Owen nor Judge Wyatt below directed notice to the members of the putative class of the denial. Thus, the putative members have not been told that they should intervene and their claims may now be barred.

the benefits of American Pipe in order to bring a further class action.

At bar, intervention would have further difficulties. Mrs. Stull was settling her private action. How could appellant intervene with his proposed class action in a private suit which was in the throes of being settled? If Mrs. Stull continued her settlement, what would the status of the intervenor be? Who would control the litigation? In short, intervention was unrealistic, and, therefore, appellant was entitled to the benefits of American Pipe though he commenced a separate action.

Permitting the benefits of American Pipe to extend to the separate action commenced by appellant would do no violence to the policy requirements of tolling the statute of limitations described in American Pipe, (414 U.S. at 534-5).

The rationale of American Pipe was that the defendants be given notice of all the substantive claims being asserted and the number and generic identities of the potential plaintiffs who participate in a judgment.

The commencement of Mrs. Stull's class action in 1972 set forth the claims and described the persons

and parameters encompassing the claims therein. As this Court held in Escott v. Barchris, supra, at P. 734:

> "If we turn on the other hand to the position of the defendants, we find nothing in the purpose or policy of the statute of limitations which would be defeated by holding that the statute was tolled by the bringing of the class suit. In Order of R.R. Telegraphers v. Railway Express Agency, Inc., 521 U.S. 342, 348-349 64 S.Ct. 582, 586, 88 L.Ed. 788 (1944) the Supreme Court said:
>
> 'Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.'
>
> In the present case the claims were not allowed to grow stale. Before the period of limitations had expired an action was instituted. The defendants were thus made aware of the nature of the evidence that would be needed at the trial. Since the action was brought on behalf of all others similarly situated, the defendants were put on notice of the possibility of claims aggregating the full sales price of all debentures. There can have been no occasion for surprise...."

Once a defendant is given such notice, it should not matter whether those claims are being asserted (if class status is denied) through intervention or through separate suit. Respondents were at all times informed of

the dimensions of the class and appellant fell squarely within that class. Appellant's class action encompasses the original class described by Mrs. Stull. Under such circumstances, respondents cannot plead surprise and the salutary effects of American Pipe can be achieved. See Eisen v. Carlisle & Jacquelin, supra. Indeed, in view of the Supreme Court's decision in Chris-Craft v. Bangor Punta, supra, permitting appellant to maintain a class action would be the only way to obtain redress for the violations of Section 14(e) committed by respondents.

If the District Court is not reversed, the patent violations of the Williams Act already found by the Court will go unredressed.

Conclusion

Appellant is the only person whose suit provides a means for redressing the violations of Section 14(e) that have occurred. His action was timely started under the New York Statute of Limitations and, that statute was tolled under American Pipe v. Utah. The District Court should be reversed.

Respectfully submitted,

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IRVING BIZAR
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ADDENDUM

N.Y. CPLR:

Section 203(f) - Time computed from actual or imputed discovery of facts. Except as provided in article 2 of the uniform commercial code or in section two hundred fourteen-a of this chapter, where the time within which an action must be commenced is computed from the time when facts were discovered or from the time when facts could with reasonable diligence have been discovered, or from either of such times, the action must be commenced within two years after such actual or imputed discovery or within the period otherwise provided, computed from the time the cause of action accrued, whichever is longer.

Section 213(8) - an action based upon fraud; the time within which the action must be commenced shall be computed from the time the plaintiff or the person under which he claims discovered the fraud, or could with reasonable diligence have discovered it.

Section 14 (e) - WILLIAMS ACT

It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FRANK DENNY : CIVIL ACTION

v. :

GERARD V. CAREY :
JOHN A. BUNTING :
JAMES F. BODINE :
FIRST PENNSYLVANIA CORPORATION :
PEAT, MARWICK, MITCHELL & CO. : NO. 76-259

FILED
FEB 28 1977

O P I N I O N

JOSEPH S. LORD, III, CH. J. FEBRUARY 22, 1977

Plaintiff, Frank Denny, a purchaser of First Pennsylvania Corp. ("First Penn") securities, brings this action alleging violation of Sections 10(b) and 20 of the Securities Exchange Act ot 1934, and the rules and regulations promulgated thereunder by the SEC.[1] Denny seeks to represent "all persons (other than defendants and their associates) who purchased securities of First Penn [from January 1, 1974 to January 28, 1976] * * * in reliance, directly or indirectly, upon false and fraudulent statements filed and circulated by defendants * * *, and who sold, or retained said securities to their loss." Plaintiff hás moved for a class action determination pursuant to Fed. R. Civ. P. 23(a) and 23(b)(3). We will certify the class.

1. The facts of this case are more fully described in our opinion denying defendants' motions to dismiss and for a more definite statement. See Denny v. Carey, Civ. Action No. 76-259 (E.D.Pa. Nov. 15 1976).

This case is well suited to class action treatment. Indeed, defendants have not challenged and we accept plaintiff's showing of conformity with 23(a)(1), (a)(2), (a)(3) and (b)(3). However, defendants do challenge the adequacy of Denny's representation of the class.[2]

Rule 23(a)(4) requires that the representative party "fairly and adequately protect the interests of the class." Defendants contend that Denny is not a proper or adequate class representative. They charge that he is not a typical investor who believes he has been damaged by reason of a securities fraud. They point out that plaintiff owns only ten shares of stock for which he paid $16 per share and that plaintiff has had numerous opportunities to sell the ten shares at a profit, or at least without a loss.[3] Defendants contend that Denny has failed to explain at what point and why he began to be dissatisfied with his stock.[4] Defendants question Denny's motives in bringing such a lawsuit when plaintiff

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2. Defendants also challenge certification on the ground that the complaint is vague and conclusionary and lacking in factual support. This argument must be rejected in light of our previous opinion, Denny v. Carey, Civ. Action No. 76-259 (E.D.Pa. Nov. 15, 1976), finding the complaint to be adequate.

3. Denny purchased his stock on January 15, 1975. Throughout July and August of 1975, the stock price ranged from a weekly average low of $16.10 to a weekly average high of $20.55. On the day this complaint was filed, the price ranged from a low of $16 to a high of $16.75. Affidavit of Karen Brancheau.

4. Except where otherwise specified, factual statements herein are based on plaintiff's deposition.

appears to have a mere $160 stake and no loss, but has stated that he is prepared to spend up to half a million dollars to protect his interest. In further support of their argument that plaintiff must have an undisclosed interest in bringing this suit, defendants point out that eleven days after the commencement of the suit, Denny, represented by the same counsel as in this case, brought a similar action with similar allegations against Chase Manhattan Corp. ("Chase"), a corporation in which he holds 15 shares of stock. Denny v. Barber, 76 Civil Action No. 548 (S.D.N.Y.). Defendants assert that plaintiff has inadequately explained how he came to choose his counsel. Pl. Ans. No. 6 to Interrog. Set #1.

Defendants contend that Denny's purchases of First Penn and Chase stock differ from his usual investment practice. As of May 14, 1976, plaintiff owned securities in approximately 12 to 15 companies. He owned "quite substantially more" than 100 shares in each of these companies with the exception of First Penn, Chase and one private company. Denny's investments are usually chosen by his stockbroker, Melvin Seiden, without plaintiff's approval. However, Denny claims to have purchased the First Penn stock solely on his own initiative after reading about bank stock investments and seeing an analyst report about First Penn and a First Penn financial report. Defendants make much to do over plaintiff's inability to specify precisely what reports he saw, and on his alleged failure to settle on

one firm investment rationale for the purchase. From the time he purchased First Penn securities, Denny received no reports or proxy statements from First Penn because all materials were sent to the custodian of his account. Plaintiff never requested that these materials be sent to him directly and does not recall whether he in fact saw any financial reports of First Penn since his purchase.

Defendants point out that securities litigation is not new to Denny. In addition to the present suit and the action against Chase, Denny also brought a shareholders suit against Minnie Pearl Corp. See Denny v. Performance System, Inc., [1972 Trans. Binder] CCH Fed. Sec. L. Rep. ¶93,387 (M.D. Tenn. 1973). A related suit was brought against the accountants for Performance Systems, Inc., Price Waterhouse & Co., by Murray Seiden and Kate Seiden. See Seiden v. Price Waterhouse & Co., 327 F.Supp. 1325 (S.D.N.Y. 1971). Murray Seiden is the father of Denny's stock-broker, Melvin Seiden, and a friend of Denny. Murray Seiden also filed a derivative suit against Chase a couple of weeks after Denny filed his suit against Chase. See Seiden v. Willard C. Butcher, 76 Civ. Action 666 (S.D.N.Y.).

Defendants, in essence, attack plaintiff's motives in bringing this suit and question the adequacy of a single representative who has a small stake and has allegedly suffered no loss and who is involved in other securities litigation. The standards of Rule 23(a)(4) are met if it appears that the named plaintiff's interests are not antagonistic

to other members of the class and plaintiff's attorneys are qualified, experienced and generally able to conduct the litigation. Sosna v. Iowa, 419 U.S. 393, 403 (1975); Wetzel v. Liberty Mutual Insurance Co., 508 F.2d 239, 247 (3d Cir.), cert. denied, 421 U.S. 1011 (1975); Santiago v. City of Philadelphia, Civ. Action No. 74-2589 (E.D.Pa. Nov. 24, 1976); Chevalier v. Baird Savings Ass'n, 72 F.R.D. 140, 144 (E.D.Pa. 1976).

Thus far, plaintiff has vigorously pursued this action. After reading Denny's deposition, we feel that he is an indignant purchaser who is prepared to make all the necessary efforts to remedy what he believes to have been a great injustice. Plaintiff has agreed to bear the costs of the litigation and has retained the firm of Demov, Morris, Levin & Shein as counsel. The firm has had a great deal of experience in securities litigation and has been appointed lead or general counsel in other securities class actions. Affidavit of Irving Bizar. The briefs we have received from plaintiff's attorneys thus far further support the fact that counsel is well qualified and able to conduct the litigation.

Defendants contend that Rule 23(a)(4) has not been complied with because there is only one named plaintiff and his holdings are small. But that is not determinative as to whether the plaintiff will fairly and adequately protect

the interests of the class. Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562-63 (2d Cir. 1968); Feder v. Harrington, 52 F.R.D.178,182 (S.D.N.Y. 1970); Epstein v. Weiss, 50 F.R.D. 387, 391 (E.D.La. 1970); Weisman v. MCA, Inc., 45 F.R.D. 258, 262 (D.Del. 1968). The fact that Denny is and has been involved in other litigation is irrelevant. Lewis v. Black, 22 F.R.Serv.2d 132, 133 (E.D.N.Y. 1975).

We also reject defendants' argument that Denny is an inadequate representative because he has not suffered any damages. Plaintiff contends that he has suffered actual damages--he claims to have overpaid for his stock even at $16 and states that the price of the stock has not always been at $16 or above. In Dorfman v. First Boston Corp., 62 F.R.D. 466 (E.D.Pa. 1973), we found the two named plaintiffs to be proper class representatives despite defendants' argument that the two plaintiffs had not suffered any actual damages. We held that to require a court to determine whether the putative class representative had suffered damages before deciding a Rule 23 motion in an action for damages would necessitate a procedure for resolving the factual dispute and would, in effect, transform a class action motion into a motion for summary judgment as to the representative plaintiff's damages. Id. at 472-73. See also Mersay v. First Republic Corp. of America, 43 F.R.D. 465, 469 (S.D.N.Y. 1968).

Finally, defendants challenge Denny's motives in bringing this action. We find no interests of plaintiff which are antagonistic to the class. As we have held before:

> "Neither the personality nor motives of the plaintiffs is determinative of whether they will provide vigorous advocacy for the members of the class. * * * [P]rinciple, coupled with the hope of rectifying a claimed loss and the prospect of a substantial recovery, may be as strong a spur to vigorous prosecution as many other motivations." Dorfman v. First Boston Corp., supra at 473; Chevalier v. Baird Savings Ass'n, supra at 147.

We believe that Denny is a proper and adequate representative, but should it later appear otherwise, we will not hesitate to act pursuant to Rule 23(c) to alter or amend our class certification. As the court in First American Corp. v. Foster, 51 F.R.D. 248 (N.D.Ga. 1970) stated:

> "If at any time the Court feels that plaintiffs' representation of the class is less than adequate it is free to refuse to allow the action to continue as a class action, to require that additional plaintiffs be brought in if the action is to continue, or to use any number of other protective courses to insure adequate representation. Fed.R.Civ.Proc. 23(c)(1); Weisman v. MCA, Inc., 45 F.R.D. 258 (D.C.Del. 1968). Thus, although the Court is interested in the adequacy of representation, and not the motive for such representation, should any 'ulterior' motives of plaintiffs which are inimical to their

ability to adequately represent the other shareholders become manifest, the Court is free to make appropriate adjustments." Id. at 250.

We presently see no ulterior motives of plaintiff which are inimical to his ability to represent adequately the other purchasers.

JOSEPH S. LORD, III, CH. J.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

Marjorie B. Bird, being duly sworn, deposes and says:

I am not a party to the action, am over the age of eighteen years, and reside at 58-15 77th Pl., Elmhurst, N.Y. 11373.

On April 8, 1977, I served two copies of Appellant's Brief and one copy of the Appendix upon each party therein named by mailing the same to said party or to his attorney at the address designated by him for that purpose, by depositing a true copy thereof in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Post Office Department within the state, as follows:

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Marjorie B. Bird
Marjorie B. Bird

Sworn to before me this
8th day of April, 1977

Mildred B. Honig
Notary Public

MILDRED B. HONIG
NOTARY PUBLIC, State of New York
No. 41-1850351 Queens County
Certificate filed in New York County
Term Expires March 30, 19[illegible]